

Subject: re: Notice of intent to bring civil action against Citizens for Ponce Inlet for violating Florida Statute 119

From: Clifford Shepard <cshepard@shepardfirm.com>

Date: 2/24/2021, 4:11 PM

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Mr. George,

We received your email expressing concern regarding claimed exempt information contained in completed IA 20-01 (the "IA Report") and provided to the Citizens for Ponce Inlet ("C4PI") pursuant to that organization's public records request for same. As explained below, the IA Report was released in compliance with Chapter 119 after careful consideration of the Town's obligations under public records law, the purpose of the various potential exemptions, protecting the rights of the Town's firefighters, and the public's right to transparency. While we understand your concerns, any lawsuit based on a claim that the clearly public record IA Report contains exempt information would be groundless for several reasons.

As you may be aware, Courts construe Florida's public records laws liberally and in favor of open government. *See NCAA v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009). When responding to a public records request, a local government agency may not redact information unless Florida law specifically exempts the information from disclosure. *See Wait v. Fla. Power & Light Co.*, 372 So. 2d 420 (Fla. 1979). If the agency has doubts as to whether an exemption applies, those doubts must be resolved in favor of disclosure rather than secrecy. *See Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986). If the agency improperly claims an exemption in response to a public records request, the local government may be sued and held liable for the requesting individual's attorneys' fees. *See* FLA. STAT. § 119.12. The same is not true when a government agency fails to assert such an exemption, particularly when it does so under the circumstances the Town was presented with here.

In contrast to *confidential* information, a local government agency has discretion to release *exempt* information when doing so would serve a public purpose. *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 54 (Fla. 5th DCA 2004). "[T]he exemption does not prohibit the showing of such information. There are many situations in which investigators have reasons for displaying information which they have the option not to display." *Id.* The Attorney General has opined that when there is a statutory or substantial policy need for information that is otherwise exempt from disclosure, the information should be made available. *See* AGO 2017-05; *see also* AGO 07-21 (Custodian, in deciding whether exempt information should be disclosed, must determine whether there is a statutory or substantial policy need for disclosure and in the absence of a statutory or other legal duty to be accomplished by disclosure, whether release of such information is consistent with the exemption's purpose).

Under this legal framework, the Town evaluated the IA Report upon receipt of the public records request from C4PI. Records pertaining to employee misconduct investigations are exempt and confidential until the investigation concludes, and the agency issues a finding. FLA. STAT. § 119.071(2)(k). Since the investigation is concluded, the IA report is no longer exempt or confidential, and the Town is only permitted to redact information which is subject to a separate exemption. Following review, the Town found that it arguably could redact some portions of the report but, for the reasons set forth below, determined that it should not do so.

In reviewing the report, the Town observed that the report included information potentially subject to the following exemptions:

- FLA. STAT. § 119.071(4)(b)1: Exempts medical information pertaining to an employee of an agency which, if disclosed, would identify that employee.
- FLA. STAT. § 119.071(4)(d)2.d: Exempts home addresses, telephone numbers, dates of birth and photographs of certified firefighters, as well as certain identifying information regarding their spouses and their children.
 - Note that "telephone numbers" is limited to telephone numbers for personal use and does not include work numbers. FLA. STAT. § 119.071(4)(d)1.b.

Because it is unlikely the medical information exemption applies to extraneous allegations by employees, the Town was limited in its ability redact such information from the interview portions of the report. The medical information exemption has previously been applied to items like medical claims printouts, medical insurance records, and pre-employment psychological examinations. *See, e.g.*, AGO 1994-98. Here, the Report includes a transcript of an interview where a city employee makes an allegation of misconduct that tangentially includes a medically related allegation. As an example, it would strain credulity to think that if one employee called another employee “crazy,” the exemption would apply due to the mental health implications of the statement. As such, the Town has properly construed the exemption to not include extraneous medical-related allegations as part of an interview regarding misconduct. The Town did redact certain bona fide medical information from the report for the protection of a firefighter.

It is also unclear whether the exemption under § 119.071(4)(d)2.d would apply to the information and photographs supplied by third parties for the purposes of the investigation. The report includes four total photographs depicting Firefighters, each of which were created in a private capacity, and which were supplied not for the purposes of identification, but as an essential part of the narrative of the investigation. There is little other identifying information in the report. The first name of a firefighter’s spouse is used, but as part of an essential complaint regarding a Firefighter misnaming the spouse to an allegedly pejorative nickname. The Town, required to construe exemptions narrowly, was justified in finding the information to not be exempt.

Note that your cell phone number is likewise not exempt. The cell phone number is in the report because you provided it in your signature on your official Town email address, underneath your official rank when making your official complaint. It therefore appears that it is the cellphone you use for work communications. You have also published the cell phone number on social media as a way for people to contact you regarding Town and Union business. As a courtesy, we have redacted the number from the version of the IA Report supplied for the website. However, should anyone formally request a copy of the report, the Town would be required to provide a copy with the number unredacted.

Even if these materials had been clearly exempt, Chapter 119 authorizes the Town to release them. The Town has a great public interest in keeping the public informed on these matters. As you are aware, the residents of the Town are keenly interested in the health and functionality of its fire department and the well-being of the firefighters. Redacting additional information pursuant to these claimed exemptions would deprive the public of essential facts and context, and the Town would have had plenty of legal and policy justifications for releasing the information in the report even if exempt. Should the Town encounter a future scenario where it has the discretion to release similar information, the Town will continue to strike a balance between the public’s right to know and firefighters’ privacy, as required by law.

Regardless of the above analysis, Chapter 119 provides no basis for a lawsuit against either the Citizens for Ponce Inlet or the Town. In fact, Chapter 119 does not create a right of action based on an agency providing information from public records *at all*. As stated in the Attorney General’s Sunshine Manual, “[n]othing in Ch. 119, F.S., indicates an intent to give private citizens a right to recovery for an agency negligently maintaining and providing information from public records.” *See* 2020 Sunshine Manual at p. 169 ([http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/\\$file/SunshineManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/$file/SunshineManual.pdf)). As such, any lawsuit against the Town or the Citizens for Ponce Inlet would be frivolous.

If you believe there are additional exemptions applicable to portions of the IA Report or if you have additional information you believe might change the Town’s analysis of this matter, we would be happy to consider same, as our goal is always to be as correct as we can be when applying the law in this important area.

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